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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

AURORA FONG, Plaintiff and Respondent, v. EASTERN MUNICIPAL WATER DISTRICT, Defendant and Appellant.	E071088 (Super.Ct.No. RIC1611915) OPINION

APPEAL from the Superior Court of Riverside County. Sunshine S. Sykes, Judge. Affirmed.

Fisher & Phillips, Regina A. Petty and Megan E. Walker for Defendant and Appellant.

Aurora S. Fong, in pro. per, for Plaintiff and Respondent.

I. INTRODUCTION

Aurora Fong (plaintiff) filed a civil suit against her employer, Eastern Municipal Water District (defendant) alleging a cause of action for illegal recording pursuant to

Penal Code sections 632 and 637.2 and four causes of action for violations of the Fair Employment and Housing Act set forth in Government Code section 12940, et seq. (FEHA). Defendant moved for summary judgment after plaintiff's counsel of record withdrew from the case, plaintiff did not file any opposition, and the trial court granted defendant's unopposed motion. Three months after entry of judgment, defendant filed a motion seeking an award of attorney fees as the prevailing party pursuant to Code of Civil Procedure section 1038[1] and the FEHA's fees shifting provisions under Government Code section 12965, subdivision (b). The trial court denied the request for fees and defendant appeals arguing: (1) the trial court erred when it denied defendant's request for reasonable attorney fees under section 1038; and (2) the trial court abused its discretion when it denied defendant's fee request under the FEHA's fee shifting provisions. We find no abuse of discretion and no prejudicial error warranting reversal.

II. FACTS AND PROCEDURAL HISTORY

In September 2015, plaintiff was denied a promotion. On September 16, 2016, following a series of disciplinary actions by her employer, plaintiff filed a civil complaint against defendant alleging a cause of action for illegal recording pursuant to Penal Code section 637.2 and four causes of action for violations of Government Code section 12940, et seq. The complaint was not verified, but was signed by plaintiff's attorney of record at the time.

[1] Undesignated statutory references are to the Code of Civil Procedure.

On September 12, 2017, the trial court granted a motion by plaintiff's counsel to withdraw from the case. On September 27, 2017, defendant filed a motion for summary judgment. In moving for summary judgment and/or summary adjudication, defendant presented evidence in order to negate essential elements of plaintiff's causes of action. No opposition was filed, and the trial court granted the motion on December 11, 2017. On December 18, 2017, defendant filed a notice of ruling regarding the trial court's order granting summary judgment.[2]

On January 16, 2018, defendant submitted a proposed judgment and judgment was entered on February 2, 2018. On March 16, 2018, defendant filed a memorandum of costs.

On May 1, 2018, defendant filed a motion seeking an award of attorney fees pursuant to Code of Civil Procedure section 1038 and Government Code section 12965 subdivision (b). Defendant submitted the declarations of two of its attorneys of record in support of the motion. The declarations explained that numerous documents were exchanged during the course of discovery; plaintiff prematurely stopped her deposition on multiple occasions requiring the deposition to take place over multiple sessions; plaintiff would not voluntarily cooperate in facilitating the depositions of her family members; and plaintiff declined to voluntarily submit to a physical or mental examination. Defendant also submitted excerpts from the transcript of plaintiff's

[2] It is unclear whether the notice of ruling was actually served on plaintiff, since the proof of service indicates it was served on November 20, 2017—prior to the hearing on summary judgment.

deposition wherein plaintiff testified she had been passed over for a promotion; that she believed a younger, less qualified individual had been hired to fill the position; that no one ever explained she was unqualified for the position or why she was denied an interview; and that she subjectively believed the actions taken by her supervisor were done in retaliation for filing grievances.

On June 13, 2018, the trial court denied the motion. At the time of oral argument, the trial court explained it did not see evidence that plaintiff clearly knew her causes of action to be unmeritorious at the time of filing her complaint, since she was represented by an attorney at the time who also believed plaintiff's claims had adequate legal and evidentiary support. The trial court further explained she did not see evidence that plaintiff maintained her action after her attorney withdrew from the case, since the record showed plaintiff did not propound any discovery, did not file any motions, and did not oppose defendant's motion for summary judgment.

III. DISCUSSION

A. Defendant Was Not Entitled to Fees Under Section 1038

Defendant contends the trial court erred in denying its request for attorney fees pursuant to section 1038. Specifically, defendant argues the trial court's conclusion plaintiff had objective reasonable cause to bring her action was erroneous as a matter of law and the trial court's conclusion plaintiff brought or maintained the action in good faith was not supported by substantial evidence. We need not reach the merits of these arguments, as we find that defendant has failed to meet its burden to establish prejudice warranting reversal.

1. General Legal Principles and Standard of Review

"[S]ection 1038 ' "provides public entities with a protective remedy for defending against unmeritorious litigation." ' [Citation.] The statute permits public entities to recover costs, including attorney fees, from a plaintiff who files a frivolous civil action under the California Tort Claims Act after a defendant prevails on a motion for summary judgment, directed verdict, or nonsuit. [Citations.] [¶] In order to recover fees under . . . section 1038, the court must ' "determine whether or not the plaintiff, . . . brought the proceeding with reasonable cause and in the good faith belief that there was a justiciable controversy under the facts and law which warranted the filing of the complaint." ' [Citation.] 'Reasonable cause' is an objective standard which asks whether any reasonable attorney would have thought the claim tenable. [Citation.] 'Thus, before denying a . . . section 1038 motion, a court must find the plaintiff brought or maintained an action in the good faith belief in the action's justifiability and with objective reasonable cause.' [Citation.]" (*Austin B. v. Escondido Union School District* (2007) 149 Cal.App.4th 860, 887-888.) "The standard of review of an award of attorney fees under . . . section 1038 is both de novo and substantial evidence. The 'reasonable cause' prong is reviewed de novo, and the 'good faith' prong is reviewed for substantial evidence. [Citation.]" (*Id.* at p. 888.)

Additionally, any error must be prejudicial. "A fundamental rule of appellate review is that the appellant must affirmatively show *prejudicial* error. [Citation.]" (*Scheenstra v. California Dairies, Inc.* (2013) 213 Cal.App.4th 370, 402.) "Prejudice is not presumed [citation], and the appellant bears the burden of establishing *both* error *and*

a miscarriage of justice [citation]." (*Donohue v. AMN Services, LLC* (2018) 29 Cal.App.5th 1068, 1104.)

2. Defendant Has Not and Cannot Establish Prejudice on this Record

Here, nearly all of the discussion in defendant's opening brief is devoted to arguments regarding alleged error in the trial court's denial of defendant's request for attorney fees pursuant to section 1038. Notably absent is any argument or mention of prejudice anywhere in defendant's briefing.

At the time of oral argument, defendant suggested that a showing of prejudice is not necessary so long as the trial court erred, but offered no authority for this argument. Nor do we find any support for this proposition. "[A]t least since 1851, our generally applicable statutes have *precluded* reversal for errors in civil cases *absent prejudice*. . . . [¶] [F]or over 100 years, the California Constitution has also expressly precluded reversal absent prejudice. . . . [¶] [A]rticle VI, section 13 generally 'prohibits a reviewing court from setting aside a judgment due to trial court error unless it finds the error prejudicial.' [Citation.] . . . It 'empower[s]' appellate courts 'to examine "the entire cause, including the evidence," ' and 'require[s]' them 'to affirm the judgment, notwithstanding error, if error has not resulted "in a miscarriage of justice." ' [Citation.]" (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1107-1108.)

As the appellant, defendant had a "duty to tender a proper prejudice argument. Because of the need to consider the particulars of the given case, rather than the type of error, the appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice. [Citations.] . . . 'Where any error is relied on for a reversal it is

not sufficient for appellant to point to the error and rest there.' " (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.) Defendant has thus failed to meet its burden on appeal to establish prejudicial error warranting reversal.

Further, our own independent review of the record shows that defendant could not meet this burden to show any prejudice arising out of the trial court's denial of attorney fees pursuant to section 1038. "Section 1038 authorizes the defendants . . . to recover reasonable costs after prevailing on a dispositive motion. . . . [However] [a]n award of defense costs may be made only on notice and an opportunity to be heard, and the court determines section 1038" costs. (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 856-857 [recognizing the procedure under section 1038 is different from the normal cost procedure].) On its face, the statute requires such a motion be made before the entry of judgment. (§ 1038, subd. (c).) Courts have interpreted this statutory language to require the motion be filed "at the earliest practical time 'prior to the discharge of the jury or entry of judgment.' [Citation.]" (*Gamble v. Los Angeles Dept. of Water and Power* (2002) 97 Cal.App.4th 253, 259.[3])

Here, the trial court granted defendant's motion for summary judgment on December 11, 2017, and judgment was entered on February 2, 2018. However,

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[3] The plain language of the statute states that costs and fees shall be awarded "only on motion made before the discharge of the jury or entry of judgment." (§ 1038, subd. (c).) While the court in *Gamble* found some ambiguity in the statutory language, that ambiguity did not extend to allow for a motion to be filed after entry of judgment. (*Gamble*, *supra*, 97 Cal.App.4th at pp. 258-259.) As our colleagues in that case explained, the statutory language and legislative history clearly indicate that a motion under section 1038 was intended to be determined "expeditiously and certainly before judgment is entered." (*Gamble*, at p. 258.)

defendant did not file its motion seeking an award of attorney fees pursuant to section 1038 until May 1, 2018—three months after entry of judgment and almost five months after the trial court's order granting summary judgment.[4] Defendant's request was therefore untimely and defendant was not entitled to an award of attorney fees under the statute regardless of the underlying merits of its request.[5] Accordingly, even if we were to assume the trial court erred as defendant argues, any such error could not have prejudiced defendant and does not warrant reversal.

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[4] At the time of oral argument, defendant also suggested that the trial court granted an extension of time to bring a motion for fees under section 1038. However, the record contains no such order. Nor does the record indicate that defendant ever requested an extension of any statutory timeline. The judgment merely states that defendants "can seek to recover its costs and attorney's fees according to law." The language, "According to law," suggests the trial court did not intend to waive any statutory requirements. Such language alone does not suggest the trial court ever contemplated, let alone granted, a request to modify the statutory mandates set forth in section 1038.

[5] We also note that defendant appears to take the position it was entitled to the same attorney fees under both section 1038 and the FEHA, treating each statutory scheme as an alternative means to recover the same fee award. However, "when necessary to vindicate an express public policy, a specific fee-shifting statute will control over a general statutory provision awarding attorney fees or costs to a prevailing party. When attorney fees or costs have been incurred on claims subject to both statutes, the more specific fee-shifting statute will govern the entire award of fees or costs." (*Dane-Elec Corp., USA v. Bodokh* (2019) 35 Cal.App.5th 761, 775.) The FEHA is generally considered to be a more specific statute than the Government Tort Claims Act. (*Garcia v. Los Angeles Unified School Dist.* (1985) 173 Cal.App.3d 701, 711 [FEHA actions are exempt from requirements of Tort Claims Act]; *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 105 [FEHA's cost award provisions govern over general provisions in Code of Civil Procedure].) Thus, even if defendant's fee request had been timely, section 1038 would not have afforded defendant the right to seek attorney fees attributable to defense of plaintiff's FEHA claims.

B. Denial of Attorney Fees Under the FEHA Was Not an Abuse of Discretion

Alternatively, defendant argues it was entitled to an award of attorney fees under the FEHA's fee shifting provisions set forth in Government Code section 12965, subdivision (b), and the trial court abused its discretion in denying defendant's request. We find no abuse of discretion on this record.

1. General Legal Principles and Standard of Review

Government Code section 12965, subdivision (b), "authorizes private actions to enforce FEHA's protections, and provides that '[i]n civil actions brought under this section, the court, in its discretion, may award to the prevailing party . . . reasonable attorney's fees and costs.' [Citations.]" (*Lopez v. Routt* (2017) 17 Cal.App.5th 1006, 1010 (*Lopez*).) "FEHA's fee shifting provision advances the statute's crucial objectives by ' "encourag[ing] litigation of claims that in the public interest merit litigation." ' [Citation.]" (*Ibid.*) "In actions under the FEHA, the court, in its discretion, may award reasonable attorney fees to the prevailing party. [Citation.] California courts have followed federal law, and hold that, in exercising its discretion, a trial court should ordinarily award attorney fees to a prevailing plaintiff, unless special circumstances would render an award of fees unjust. A prevailing defendant, however, should be awarded fees under the FEHA only 'in the rare case in which the plaintiff's action was frivolous, unreasonable, or without foundation.' [Citation.]" (*Young v. Exxon Mobil Corp.* (2008) 168 Cal.App.4th 1467, 1474.)

" '[A]n unsuccessful FEHA plaintiff should not be ordered to pay the defendant's fees or costs unless the plaintiff brought or continued litigating the action without an

objective basis for believing it had potential merit.' " (*Lopez, supra*, 17 Cal.App.5th at p. 1011; see *Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (2018) 19 Cal.App.5th 525, 545.) The burden is upon the defendant seeking an award of fees to make a showing that the action was frivolous, unreasonable, or without foundation. (*Lopez*, at p. 1009; *Arave*, at p. 549 ["prevailing defendants may recover only if they show the plaintiff's FEHA claims are frivolous."].)

A trial court's ruling denying attorney fees pursuant to the FEHA is reviewed for abuse of discretion. (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 989; *Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1387.) " ' "While the concept 'abuse of discretion' is not easily susceptible to precise definition, the appropriate test has been enunciated in terms of whether or not the trial court exceeded ' "the bounds of reason, all of the circumstances before it being considered. . . ." ' [Citations.]" [Citation.] "A decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' [Citations.] In the absence of a clear showing that its decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate objectives and, accordingly, its discretionary determinations ought not be set aside on review." ' " (*Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1249-1250.) "[T]here is no abuse of discretion requiring reversal if there exists a reasonable or fairly debatable justification under the law for the trial court's decision or, alternatively stated, if that decision falls

within the permissible range of options set by the applicable legal criteria." (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 957.)

2. Application

The record before us does not evidence an abuse of discretion by the trial court. As a prevailing employer seeking fees under the FEHA, the burden was on defendant to show plaintiff either "brought" or "continued to litigate" the action without an objective basis for believing it had potential merit. However, defendant's motion failed to clearly set forth evidence to establish what facts plaintiff had within her knowledge at the time suit was filed. According to the declarations submitted in support of defendant's motion, the exchange of documents and plaintiff's personnel file occurred after filing of the complaint during the discovery process.[6] There was no declaration explaining what documents plaintiff had been given access to prior to filing of suit in order to evaluate the merits of her claims. Defendant argues that plaintiff's unsuccessful administrative challenges to disciplinary actions taken against her prior to filing suit is evidence that plaintiff knew her claims had no merit. However, the denial of a promotion was alleged as an adverse employment action in support of plaintiff's FEHA claims.[7] There is no indication in the record that this was ever the subject of an administrative review prior to the filing of suit. On this record, it was not outside the bounds of reason for the trial

[6] Indeed, defendant's motion argued that "it was clear" after production of documents that plaintiff's claims had no merit.

[7] In fact, three of plaintiff's four FEHA claims were for discrimination and plaintiff explicitly alleged the denial of a promotion as a basis for those claims.

court to conclude defendant had not met its burden to show plaintiff "brought" her action without an objective basis for believing it had potential merit.

Nor does the record compel the conclusion that plaintiff "continued to litigate" her action after it became clear she would not succeed on her claims. As the trial court noted at the time of hearing on defendant's request for attorney fees, there was no evidence plaintiff took any affirmative action to pursue her claims following her attorney's withdrawal from the case and the filing of defendant's summary judgment motion. Plaintiff did not file an opposition[8] to defendant's motion and the record does not indicate plaintiff initiated any discovery or filed any motions requiring defendant's response during this time. Thus, the trial court was within the bounds of reason to conclude defendant had not met its burden to show plaintiff continued to litigate her action after it became clear she lacked evidence to support her claims. We find no abuse of discretion and therefore no grounds for reversal.

[8] Defendant's reliance on *Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, is clearly distinguishable on this basis. In *Villanueva*, a different panel of this court upheld a fee award under the FEHA in favor of a defendant following summary judgment. (*Id.* at p. 1200.) However, the plaintiff in that case filed opposition to summary judgment, including declarations filled with "argument, conjecture and other inadmissible content" purporting to be "evidence" showing a triable issue of material fact precluding summary judgment. (*Ibid.*) Thus, the plaintiff in that case took affirmative action to continue litigating the case in opposing summary judgment. The record here does not disclose any similar acts by plaintiff in this case.

IV. DISPOSITION

The trial court's June 13, 2018 order denying defendant's request for attorney fees is affirmed.

Plaintiff and respondent is awarded costs on appeal.

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FIELDS
J.

We concur:

CODRINGTON
Acting P. J.

MENETREZ
J.